

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLEE**

Affidavit

76-6116

To be argued by
MARY P. MAGUIRE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-6116

GASTON BRIONES and CECILIA BRIONES,
Plaintiffs-Appellants,
—against—

MAURICE F. KILEY, District Director for the New
York District, Immigration and Naturalization Service,
United States Department of Justice,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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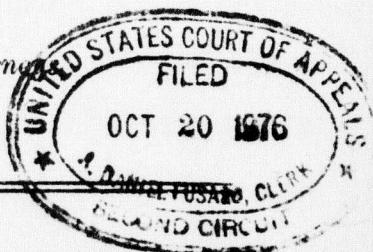


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MAURICE F. KILEY, District Director for the New York
District, Immigration and Naturalization Service,
United States Department of Justice,
Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE

Statement of the Case

This is an appeal from an order of the Honorable Charles H. Tenney, United States District Judge for the Southern District of New York. On June 29, 1976 Judge Tenney entered an order denying appellants' motion for a preliminary injunction in accordance with his opinion of the same date (A. 3-11).*

On March 10, 1976 appellants instituted a declaratory judgment action in the United States District Court in the Southern District of New York in which they sought a judgment declaring that appellee's denial of their ap-

* References preceded by the letter "A" refer to the pages of the appellants' appendix.

plication for reinstatement of voluntary departure, in lieu of deportation, was arbitrary and capricious and constituted an abuse of discretion. Appellants' motion for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure was denied by Judge Tenney who found that the appellants had failed to meet their burden of showing either a clear likelihood of success or that they have raised serious questions going to the merits.

Statement of Facts

Appellant Gaston Briones ("Briones") is a 30 year old alien, a native and citizen of Chile. He entered the United States on September 27, 1969 as a non-immigrant visitor for pleasure and was authorized to remain in the United States until November 27, 1969. A short time after the expiration of his authorized stay Briones was located at his place of employment by immigration officers and was given a pass directing him to appear at an office of the Immigration and Naturalization Service (the "Service"). Instead of doing so, however, Briones changed his employment and absconded.

Appellant Cecilia Briones ("Mrs. Briones") is a 29 year old alien, also a native and citizen of Chile. She is the wife of appellant Gaston Briones. Mrs. Briones entered the United States on January 31, 1970 as a non-immigrant visitor for pleasure and was authorized to remain in the United States until June 30, 1970. She sought and received one extension of her authorized stay to December 30, 1970. On March 20, 1970 appellants were married at New York City.

On February 4, 1971 appellants, both of whom were deportable as overstay nonimmigrants, appeared at the New York District Office of the Service and stated that

they wished to seek political asylum. On February 28, 1972 the appellants were advised that their request for political asylum had been denied and they were asked if they were willing to voluntarily depart from the United States in thirty (30) days. Their reply was in the negative and they were advised that deportation proceedings would be instituted.

Deportation proceedings were instituted against appellants on February 28, 1972. A deportation hearing was held on May 3, 1972. At that time the appellants, who were represented by counsel, conceded their deportability and requested the privilege of voluntary departure pursuant to Section 244(e) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1254(e). They also designated Spain as the country to which they wished to be deported. The Immigration Judge entered orders on May 3, 1972 granting appellants the privilege of voluntary departure until September 3, 1972. He also entered alternate orders of deportation to Spain or, in the alternative, to Chile, in the event the appellants failed to voluntarily depart by the prescribed date. Since the appellants waived appeal, the orders of the Immigration Judge became final on the date entered. 8 C.F.R. § 243.1.

On September 1, 1972, only two days prior to the expiration of their period of voluntary departure, appellants, by their attorney, requested "a first and final extension of such voluntary departure" to December 3, 1972. The request was based upon the need of Mrs. Briones' employers for her services during that two month period. The request was denied on September 5, 1972 but the appellants' attorney was advised that if he presented confirmed departure tickets for on or before September 20, 1972, the appellants could preserve the privilege of voluntary departure. Appellants failed to depart voluntarily and on November 6, 1972, warrants of deportation were issued and appellants were advised that the orders of deportation would be enforced.

On December 8, 1972, appellants, by their attorney, submitted applications for stays of deportation based on the physical condition of Mrs. Briones, who was then pregnant. By letter dated December 18, 1972, the Service advised appellants that their applications had been granted and that their deportation would be stayed until January 11, 1973. They were advised that if they were prepared to depart by that date, consideration would be given to their request for restoration of the privilege of voluntary departure.

On January 10, 1973, appellants, by their attorney, submitted a request for a one-month extension of the stay of deportation. The request was again based on the physical condition of Mrs. Briones. The appellants' attorney took pains to stress that the appellants intended to depart voluntarily from the United States at their own expense. Furthermore, the Department of Labor had granted Mrs. Briones a labor certification, which she required in order to obtain a visa, and the plaintiffs had obtained a priority date of October 10, 1972 on the Western Hemisphere visa waiting list. On June 4, 1973, Mrs. Briones gave birth to a daughter who is a United States citizen.

On September 21, 1973, appellants, by their new attorney, submitted a motion to reopen their deportation proceedings and for a stay of deportation to permit them to apply for the benefits of Section 243(h) of the Act, 8 U.S.C. § 1253(h), *i.e.*, withholding of deportation based on fear of persecution in Chile. Appellants were examined by the Service with respect to their persecution claims on December 4, 1973 and the facts in their case were submitted to the Department of State, Office of Refugee and Migration Affairs. On March 21, 1974, the Department of State advised that it did not appear that appellants

had a valid political asylum claim. The Service concurred with the view of the Department of State and, by letter dated April 24, 1974, the Service advised the appellants that their request for political asylum had been denied and that their deportation would not be stayed by virtue of the motion to reopen which had been referred to an Immigration Judge. On April 25, 1974, the appellants were again advised that the deportation orders would be enforced.

By decision dated May 6, 1974, the Immigration Judge denied appellants' motion to reopen their deportation proceedings but again granted appellants the privilege of voluntary departure for a period of two weeks from the date of the order. Specifically, he ordered that the outstanding order of deportation would be deemed lifted upon their departure from the United States on or before May 20, 1974. Again, appellants failed to depart.

On May 14, 1974 the law firm of Pollack and Kramer filed a notice of appearance on behalf of appellants and requested a further extension of the time granted appellants to depart from the United States. The request was denied and by notices dated June 18, 1974 appellants were directed to surrender for deportation on July 8, 1974.

On July 8, 1974, appellants by their attorney, filed an action in the District Court raising the same issue which was being litigated in another action, *Noel v. Chapman*. The issue raised was whether aliens similarly situated as these appellants should be permitted to remain in the United States in an extended departure status until their priority date for visa issuance became current. The *Noel v. Chapman* case had been commenced in the District Court on August 24, 1973 and on Feb-

ruary 8, 1974, Judge Gagliardi had entered an order denying a preliminary injunction in that case. On February 27, 1974, a notice of appeal to this Court was filed by the plaintiffs in *Noel v. Chapman*. From the institution of the *Noel* case, the *Noel* plaintiffs were represented by the law firm of Pollack and Kramer. Thus, when the Briones filed a *Noel* type complaint on July 8, 1974, the date on which they were due to surrender for deportation, their attorneys had been litigating the *Noel* case for almost one year and had, in fact, filed their brief on appeal on June 10, 1974. Upon the filing of the *Noel* type complaint by the Briones on July 8, 1974 the parties to that action, the Briones and the Service, stipulated that the deportation of the Briones would be stayed pending the decision in the *Noel* appeal and that the Briones would be bound by the decision in the *Noel* case. The *Noel* case was decided adversely to the appellants by the Second Circuit on January 4, 1975 and on October 6, 1975 the Supreme Court denied a petition for certiorari.

While the petition for certiorari in *Noel* was pending, the Briones were notified that a visa appointment had been scheduled for them at the American Embassy, Santiago, Chile. Since it was to their advantage appellants were now ready and willing to leave the United States. However, if they left under an order of deportation, they would then be excludable from the United States under Section 212(a)(17) of the Act, 8 U.S.C. § 1182(a)(17), and, therefore, would be denied a visa unless they secured the Attorney General's permission to reenter. Consequently, on April 7, 1975, appellants, by their attorney, sought restoration of voluntary departure. Their request was denied by the defendant on that date and their motion for reinstatement of voluntary departure was referred to the Immigration Judge.

A hearing on the motion to reopen was held on April 18, 1975. In a decision dated April 21, 1975, the Immigration Judge denied the motion to reopen. Appellant appealed that decision to the Board of Immigration Appeals which dismissed the appeal by a decision and order dated July 16, 1975. Since the appellants still enjoyed a court-ordered stay of deportation the Service was unable to enforce the deportation order. Appellants did not seek to review the Board's order in the Court of Appeals pursuant to Section 106(a) of the Act, 8 U.S.C. § 1105(a).

Upon being advised that the Supreme Court had denied the petition for certiorari in the *Noel* case, the Service began to enforce the departure of all aliens who had been stipulated into the *Noel* case. Consequently, by notice dated January 28, 1976, appellants were notified to surrender for deportation on February 10, 1976. On February 4, 1976 appellants, by their attorneys, filed an application for a thirty (30) day stay of deportation so that Mr. Briones could sell a restaurant which he had purchased in March 1974 and also requested that voluntary departure be restored. The appellee granted the appellants' request for a thirty day stay of deportation but denied the application for restoration of voluntary departure.

On March 10, 1976 appellants instituted a declaratory judgment action in which they sought to review the appellee's denial of their application for restoration of voluntary departure. On that date the District Court issued an order directing the appellee to show cause why a preliminary injunction should not be issued to stay the deportation of the appellants pending final disposition by the Court of the declaratory judgment action. The order of March 10, 1976 provided that the appellee was restrained from taking into custody or deporting the appellants.

lants pending the hearing and determination of their motion for a preliminary injunction. By order dated June 29, 1976 appellants' motion for a preliminary injunction was denied and this appeal followed.

Relevant Statute

Immigration and Nationality Act of 1952, as amended:
Section 244, 8 U.S.C. § 1254—

* * * * *

(a) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of Section 241(a) (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

Relevant Regulation

Code of Federal Regulations, Title 8 (8 C.F.R.)—
§ 244.1 Application.

Pursuant to Part 242 of this chapter and section 244 of the Act a special inquiry officer in his discretion may authorize the suspension of an

alien's deportation; or, if the alien establishes that he is willing and has the immediate means with which to depart promptly from the United States, a special inquiry officer in his discretion may authorize the alien to depart voluntarily from the United States in lieu of deportation within such time as may be specified by the special inquiry officer when first authorizing voluntary departure, and under such conditions as the district director shall direct. An application for suspension or deportation shall be made on Form I-256A.

§ 244.2 Extension of time to depart.

Authority to extend the time within which to depart voluntarily specified initially by a special inquiry officer or the Board is within the sole jurisdiction of the district director. A request by an alien for an extension of time within which to depart voluntarily shall be filed with the district director having jurisdiction over the alien's place of residence. Written notice of the district director's decision shall be served upon the alien and no appeal may be taken therefrom.

A R G U M E N T

The District Court properly denied appellants' motion for a preliminary injunction.

A preliminary injunction is an extraordinary equitable remedy, the application for which is addressed to the sound discretion of the trial court. *Berrigan v. Norton*, 451 F.2d 790, 193 (2d Cir. 1971). Reversal of the trial court's decision requires a showing of an abuse of that discretion. *Cinematografica v. D-150, Inc.*, 366 F.2d 373, 374 (2d Cir. 1966). In order to establish his right to a preliminary injunction a party must demonstrate, among

other things, a strong likelihood of ultimate success on the merits, and that he will be entitled to the relief he seeks. *Brown v. Chote*, 411 U.S. 452, 456 (1973). Thus, in this case, where appellants are complaining of the appellee's failure to grant them discretionary relief, they must demonstrate to the trial court that the appellee either abused or failed to exercise his discretion and that they are entitled to the relief they seek.

The sole issue before the District Court was whether the appellee had abused his discretionary authority in denying appellants' request for reinstatement of voluntary departure.* The grant of voluntary departure pursuant to Section 244(e) of the Act is a privilege that is accorded to deserving but deportable aliens and is within the sound discretion of the Attorney General. To qualify for that privilege the alien must prove that he is able and willing to depart the country at his own expense within a designated period. This privilege is usually initially obtained at a deportation hearing,** and is often the maximum relief for which a deportable alien can qualify. The order entered at a deportation hearing invariably provides that if the alien does not voluntarily depart within the time prescribed that he be deported.

Once an alien fails to depart within the prescribed time the alternative provision of the deportation order becomes effective and a warrant of deportation is issued. 8 C.F.R. § 243.2. The alien faced with deportation under

* The privilege of voluntary departure may be of considerable importance to an alien facing expulsion as a deported alien must obtain permission from the Attorney General to apply for admission to the United States. Section 212(a)(17) of the Act, 8 U.S.C. § 1182(a)(17).

** The Attorney General has delegated his authority initially to Special Inquiry Officers, 8 C.F.R. § 244.1.

the warrant can apply to the District Director for reinstatement of the privilege of voluntary departure. A District Director may cancel the warrant and reinstate the privilege of voluntary departure. This administrative proceeding is done informally without recourse to a hearing or appeal to the Board. There is little express authority for the District Director's action and the theory is that it is a *nunc pro tunc* extension of the voluntary departure period pursuant to 8 C.F.R. § 244.2. This administrative practice emerged from humanitarian considerations and a corresponding need for governmental economy. However, this informal administrative process never superseded the normal procedure whereby an alien could move to reopen his deportation proceedings and move for reinstatement of the privilege of voluntary departure based upon a showing of changed circumstances. See 8 C.F.R. §§ 3.2, 242.22.*

The District Director's discretionary act of cancelling the warrant of deportation and reinstating voluntary departure is done on a case by case basis. This ameliorative relief was never intended to encompass deportable aliens who demonstrated an absence of good faith or who sought to remain in the United States by utilizing dilatory tactics. Certainly, such a distinction is a reasonable basis for withholding the favorable exercise of discretion. *Lee Pao Fen v. Esperdy*, 423 F.2d 6 (2d Cir. 1970); *Lam Tat Sin v. Esperdy*, 277 F. Supp. 482 (S.D.N.Y.), *aff'd*, 334 F.2d 999 (2d Cir.), *cert. denied*, 379 U.S. 901 (1964).

* The appellants have twice moved to reopen their deportation proceeding to seek reinstatement of voluntary departure. The first motion was denied on May 6, 1974 by the Immigration Judge. The second motion was denied by the Immigration Judge on April 21, 1975 and on July 16, 1975 the Board of Immigration Appeals dismissed the appeal.

Although a deportable alien has a right to submit an application for restoration of voluntary departure and has a right to a discretionary determination on its merits, the granting of the privilege is not a matter of right but of administrative grace. *Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957); *Polites v. Shali*, 302 F.2d 449 (6th Cir. 1962). The scope of judicial review of the District Director's decision is an extremely narrow one. *Muscardin v. Immigration and Naturalization Service*, 415 F.2d 865 (2d Cir. 1969). Unless that decision is found to be without any rational explanation or to depart inexplicably from established practices so as to rest on an impermissible basis, the reviewing court should not substitute its judgment for that of the District Director. *Bolanos v. Kiley*, 509 F.2d 1023 (2d Cir. 1975); *Noel v. Chapman*, 508 F.2d 1023 (2d Cir.), cert. denied, — U.S. — (1975); *Wong Wing Hang v. Immigration and Naturalization Service*, 360 F.2d 715 (2d Cir. 1966). The burden of proving that an extension or reinstatement of voluntary departure should be granted is always on the alien. *Roumeliotis v. Immigration and Naturalization Service*, 304 F.2d 453 (7th Cir. 1962), cert. denied, 371 U.S. 921 (1962).

It is submitted that the District Court correctly found that the District Director did not abuse his discretionary authority. The appellants have attempted to use every available delaying tactic to postpone their departure until they could obtain immigrant visas abroad. Having accomplished this delay they seek the restoration of a privilege which they have previously abused on several occasions so that they can return to the United States as immigrants while suffering only the slightest interruption of their presence and activities in this country. *Fan Wan Keung v. Immigration and Naturalization Service*, 434 F.2d 301 (2d Cir. 1970). Having overstayed their temporary visit as nonimmigrants the appellants were grant-

ed the privilege of voluntary departure at their deportation hearing. Again they refused to depart within the time granted them and after warrants of deportation were issued they applied for and were granted two stays of deportation based on Mrs. Briones' pregnancy. Having thus delayed their deportation by almost a year, the appellants then applied for yet another stay of deportation and moved to reopen their deportation proceedings to apply for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. § 1253(h), claiming that they would be subject to political persecution in their native country. However, appellants' affidavits in support of the motion to reopen merely referred to the reputed political conditions in Chile and the difficulty which appellants anticipated in obtaining employment in Chile after their long absence from that country. The Immigration Judge denied the motion to reopen since no useful purpose would be served by reopening the proceedings. However, the Immigration Judge did provide that if the appellants departed within two weeks the order of deportation would be deemed lifted. Again, appellants failed to depart. Appellants did not appeal the order to the Board of Immigration Appeals, as they had the right to do.

Rather, on July 8, 1974, the date on which appellants had been ordered to surrender for deportation, they were joined to the *Noel v. Chapman* case, which was then on appeal to this Court, and thereby gained a stay of deportation. However, while the *Noel* case was pending the appellants received visa appointments from the American consul in Chile and sought reinstatement of voluntary departure so that they could return to Chile for visa issuance. The District Director denied the application and referred the motion to reopen their deportation proceedings for reinstatement of voluntary departure to the Immigration Judge. The transcript of the hearing which

was held on that motion clearly reflects that the appellants had no intention of complying with any orders of the Service or of the Immigration Judge unless and until it suited their convenience. The Immigration Judge in a strongly worded opinion dated April 21, 1975 denied the motion to reopen and on July 16, 1975 the Board of Immigration Appeals affirmed the decision of the Immigration Judge and dismissed the appellants' appeal. Appellants did not seek judicial review of the Board's order pursuant to Section 106(a) of the Act, 8 U.S.C. § 1105a (a). However, their deportation was still stayed by virtue of the *Noel* litigation. Not until the Supreme Court denied *certiorari* in that case on October 6, 1975 did the Briones again face the threat of deportation.

Appellants seek to justify their failures to depart on the ground that they wanted to present their political asylum claims and to join the *Noel* litigation. What appellants conveniently overlook, however, is that their voluntary departure time had expired in September 1972, a year before they presented their political asylum claims and almost two years before they commenced their *Noel* action. While the appellee does not contend that the political asylum claim was frivolous and therefore dilatory, it is undisputed that appellants' affidavits in support of their claim are exceedingly weak and that appellants sought no further administrative or judicial review of the order of the Immigration Judge denying their motion to reopen their deportation proceedings to present their claims.

Likewise, appellants' participation in the *Noel* litigation does not change the fact that, unlike the majority of those aliens who were joined to the *Noel* case and who were still in voluntary departure status, the appellants had been subject to outstanding warrants of deportation

since November 1972. The Service agreed to stay the appellants' deportation until the *Noel* litigation was terminated. There was no agreement, however, that voluntary departure would be restored upon completion of the *Noel* case. Appellants' contention that they had to overstay their second grant of voluntary departure in order to be involved in the *Noel* litigation is totally without merit. The *Noel* case had been instituted in 1973 and at the time of the Briones' second grant of voluntary departure an appeal was already pending in this Court.

Finally, the appellants argue, for the first time, that the order of the Immigration Judge dated May 6, 1974 reinstated voluntary departure and that such voluntary departure has never expired because the District Director never set the time to depart under that order. The appellants rely on the decision of the Board of Immigration Appeals in *Matter of Yeung*, 13 I. & N. Dec. 528 (1970) in support of their contention. In that case, the Board held that an Immigration Judge has authority under the current regulations to reopen deportation proceedings for the limited purpose of considering a new grant of voluntary departure to an alien who has permitted a prior grant of that privilege to expire. However, the Board held that such authority does not empower the Immigration Judge to fix the departure time when authorizing voluntary departure anew.

Although the Immigration Judge's decision of May 6, 1974 purports to deny the motion to reopen for reinstatement of voluntary departure, the practical effect of the order was to grant voluntary departure anew and to fix, erroneously, the departure time. *Matter of Yeung, supra*, at 530. Since the Immigration Judge did not have the authority to set a new voluntary departure date, the appellants contend that the renewed grant of voluntary departure is still in effect since the appellee District Director never set a departure date.

Initially, we note that the appellants have not previously questioned the authority of the Immigration Judge to set a new departure date but in fact treated the prescribed date as binding on them when they applied on May 14, 1974 for an extension of their voluntary departure time. In any event, the appellants certainly did not believe that they were still in voluntary departure status on April 5, 1975 when they applied for reinstatement of voluntary departure. Appellants should not be permitted to argue at this time that the provision of the May 1974 order relating to the voluntary departure date was invalid in view of the fact that over the past two and one half years they have never questioned the validity of the order.

Furthermore, the record reflects that on May 14, 1974 the appellants sought an extension of their voluntary departure date and that such extension was denied as is evidenced by the notices sent to the appellants directing them to surrender for deportation on July 8, 1974. There is no reason why such action is not consistent with a finding that the May 20, 1974 date was adopted by the District Director as the voluntary departure date.

CONCLUSION

The decision of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York) ss
County of New York)

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
20th day of October, 1976 she served two copies of the
within Appellee's Brief

by placing the same in a properly postpaid franked envelope
addressed:

Stanley H. Wallenstein, Esquire
Schiano & Wallenstein
80 Wall Street
New York, New York 10005

And deponent further
says she sealed the said envelope and placed the same in the
mail chute drop for mailing in the United States Courthouse Annex,
One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Marian J. Bryant

20th day of October, 1976

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978